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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1088

COREX CORPORATION, dba QUICK CORPORATION OF AMERICA
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION FOR PETITION FOR CERTIORARI

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WESTERN PRINTING COMPANY, WHITTIER—696-1722

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The Memorandum for the United States in Opposition for the Petition for Certiorari is based upon the Commissioner of Internal Revenue's determination, and not that of the District Court, which considered the real issues set out in the case law and Revenue Bulletins, among them being: (1) whether a principal and agency relationship existed, (2) when does the title pass as between two residents in the United States, (3) who withdraws the merchandise from the bonded warehouse, (4) what did the paper-work show

(Vol. I, R.T. p. 16, 11. 7-15, 25, 1. 15 p. 17), (5) whether Jon H. was a *bona fide* importer, (6) was there arms-length transaction between the importer and distributor or just a cover-up to avoid taxes, (7) the paper work, formation of the companies, and how they got started, financing contracts of importation, (8) who pays freight, insurance, and costs (Vol. I, R. T. pp. 5-14). and found in favor of petitioner.

Respondent, in setting forth the facts, omits the most salient facts which were considered by the District Court in arriving at its Findings.

Petitioner was originally organized for the primary purpose of importing and exporting fishing equipment (Df's Ex. AA, Vol. III, R.T. p. 211).

Petitioner was not owned by D.A.M., but by Phil Greyshock, a 25% stockholder, and by Lutz Kuntze and Rupert Kuntze who, between them, owned the balance of the 75% issued stock, and who had a part-interest in D.A.M., which was not a corporation. Shortly after its formation, Petitioner began operations as the exclusive importer of D.A.M. fishing reels and supplies (Vol. IV, R.T. pp. 42, 136).

Petitioner continued to be the importer until the summer of 1968. During this period, the distributor was the Gladding Company, a separate unrelated entity.

In June 1968, Gladding decided to get out of the business of distributor of "Quick" reels because they

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were going into the manufacture of a very similar product they were making themselves (Vol. III, R.T. p. 137).

Denker, the German exporter who had exclusive rights to the United States market, had no financial interest in D.A.M. or petitioner, made the decision to substitute petitioner in the place of Gladding, as the distributor, and Jon H. in the place of petitioner, as the importer (Vol. III R.T. pp. 140-141).

The respondent does admit, on page 2 of its memorandum, that when in June 1968, petitioner took over the distribution activities of Gladding, that there was substituted in its place a new entity, Jon H. Importing Company.

The cases of *Handley Motor Co.* v. *United States,* 338 F.2d 361 (Ct. Cl.); and *Import Wholesalers Corp.* v. *United States,* 368 F.2d 577, 585 (Ct. Cl.), cited by the respondent, are not in point, and are distinguishable for the reason that the substance of the transactions was to supply the importer with a method of importing V.W.'s into the United States, and its only act was to place its order for a stipulated fee without assuming any of the risks of importation.

Jon H. took the initiative to bring the fishing tackle into the United States, by ordering all the fishing tackle that was available, without first consulting petitioner. This was done on the basis of annual projec-

tion from Denker of the fishing tackle available. (Vol. III R.T. p. 147 line 10 to line 15, p. 148) Purchase orders were not issued by petitioner until Jon H. received notification from Denker of the portion of the annual projection of reels that had been shipped at a given time (Vol. III R.T. p. 145, lines 7-11).

The respondent entirely overlooks the undisputed fact that Jon H. initiated the credit arrangement with Denker (Vol. III, R.T. p. 40). Jon H. established a line of credit with the Crocker Bank in the amount of $25,000 by putting up a Certificate of Deposit in the amount of $10,000 (Pl. Ex. 41, Vol. II, R.T. p. 95, l. 1 to l. 2 p. 96). Jon H., without consulting petitioner, fixed the per-unit price at the beginning of each year, which remained the same for the entire season (Pl. Ex. 22, Vol. II p. 71, R.T. pp. 171-176).

The amount of Jon H.'s profit was not fixed, but was over and above the cost of the merchandise and all costs of importation, which varied due to the fact that some of the costs of importation were the same regardless of whether there was a large or small shipment (Pl. Ex. 17 and 34, Vol. II, R.T. pp. 17 and 105). Warehousing and other costs were not passed on to the petitioner in the price charged.

Jon H. subjected and exposed itself to the following risks, among them being: (1) Liability for $100,000 on a term-bond executed in favor of the United States (Pl. Ex. 3, R.T. Vol. II, p. 32). (2) payment to Denker for the merchandise. (3) payment of insurance,

(4) losses not covered by insurance, (5) brokerage fees, (6) payment of excise tax and duties, (7) warehousing, (8) wharfage and handling charges, (9) all other costs and expenses of importation including local property taxes (Vol. II, R.T. p. 98, l. 8 to l. 4 p. 103; Pl. Ex. 18 R.T. Vol. II, p. 194).

Jon H. caused merchandise to be released from Customs or a Customs bonded warehouse. All the brokerage fees and importation costs were not provided by petitioner before receipt of merchandise, as Jon H. paid a total of $48,638.24 importation costs (Df. Exs. D-1 R.T. Vol. III, p. 168, and D-2 p. 168).

The facts in the *Sony* case, 428 F.2d 1258, upon which the petitioner relies, are essentially similar to those in the instant case. However, in some respects, the facts in the instant case are much more favorable to the petitioner. In *Sony,* 100 or 101 shares of *Sony of America* were owned by *Sony of Tokyo.* In *Sony,* there was an exclusive distributor agreement with only one client, whereas the petitioner had the first refusal to purchase the merchandise, and Jon H. did actually sell to other distributors (Vol. III, R.T. p. 154, l. 19 to l. 14 p. 159; Pl. Exs. 27 to 31, Vol. II, R.T. pp. 89, 90, 95, and 97.

Respondent premises some of its argument on the low overhead and profit made by Jon H. as a factor which the District Court did consider in determining who is the importer. *Sony* did not consider the fixed commission of 3% of the selling price that was

invoiced F.O.B., value of goods, Custom duty, bonded charges, and all excise tax, which were included in the invoice as determinative of one of the real issues.

Jon H. was forced to a minimum of overhead in order to meet competition, and had its overhead been greater, it could not have made any profit at all.

The decisions or the regulations do not dictate the amount of profit that one is entitled to in order to come within the definition of an importer.

Agrod's capital stock was $1,500, whereas Jon H.'s was $1,000. Jon H. had warehouse facilities available in a Customs bonded warehouse (Pl. Ex. 17, Vol. II, p. 71, and Df. Ex. D-2. Vol. III, R.T. p. 168.

In *Sony,* the subdistributor used a letter of credit to pay for the merchandise. Denker, the exporter, and not the petitioner financed the payment of the merchandise by extending the credit, which accomplished the same purpose as a letter of credit. *Sony* does not hold that an importer must have the independent ability to pay for the merchandise.

In *Sony,* at page 1267, the Court found that all the contracts involved demonstrate arms-length bargaining:

> "There can be no question that the contracts between Mr. Gross and Sony Tokyo were at arms length and based on sound business considerations as were those between Mr. Goss, Agrod, and Delmonico.

> "The fact that these contracts were basically continued throughout with different parties is very persuasive, as is the fact that the government apparently accepted Agrod as the importer when Delmonico was the designated subdistributor."

The authority of *Sony* has not been challenged by any later decisions.

Petitioner respectfully submits that all contracts involved demonstrate arms-length transactions between the parties and are of economic substance.

Jon H. performed the vital function so necessary to successfully bring the fishing tackle into the United States, buying the fishing tackle from Denker, was liable for payment thereof, assuming all the risks of importation, none of which was shared or assumed by petitioner; caused it to be shipped into the United States, and made a varied profit instead of a fixed fee on the sale of the fishing tackle. All the documents of title were in Jon H. prior to the time the fishing tackle was unloaded at the dock in Los Angeles.

The District Court made substantially the same finding of fact as in *Sony* (Clk. Tr. No. 9, p. 161) and did look at the realities, contrary to the contention of the respondent, where it stated, at page 47, Vol. IV, R.T.:

> "and if anybody was inducing the importation, it was certainly Jon H. He was the one who wanted to build it up and Jon H. is the one that wanted to sell all that he could, and then get all he could

> from Denker, and then turn around and ask Corex how many did they want because they had the right of first refusal, and what he didn't want he would sell to anybody else."

Respondent had no objection to the findings of the District Court and, on oral argument before the Court of Appeals, admitted that findings of the District Court sustained its judgment.

The respondent, in its memorandum, completely overlooks Conclusion of Law No. 3, where it states:

> "The plaintiff did not, as principal, arrange for, induce, or cause, the taxable articles to be brought into a port of the United States with intent to unload. Neither did it actually import the taxable articles." (Clk. Tr. p. 163.)

This conclusion is adequately supported by the evidence, and the Court of Appeals cannot make new findings or draw ultimate inference therefrom.

See: *McAllister* v. *United States*,
348 U.S. 19, 20, 22, 23 (1954);
United States v. *United States Gypsum Co.*,
333 U. S. 364, 394 (1948).

Respondent refers to Rev. Rul. 67-209, 1967-1 Cum Bul. 297, stating that the Court of Appeals relied upon it in determining who was the importer. It is petitioner's information that a later ruling in the *Impeco* matter which sustains petitioner's position and, in effect, overrules 67-209. Although an effort has been made

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to obtain the ruling from the Revenue Service, it has not been made available.

For the reasons set forth in the petition for certiorari, and this reply, petitioner prays that its petition for a writ of certiorari be granted.

Rrespectfully submitted,

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